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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL SMITH, Defendant and Appellant.	B200975 (Los Angeles County Super. Ct. No. BA305589)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed.

Law Offices of Joan Wolff and Joan Wolff, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters, Roberta L. Davis and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Michael Kejuan Smith guilty of two weapons-related offenses—carrying a loaded firearm in violation of Penal Code section 12031, subdivision (a)(1),[1] specially finding he was not the weapon's registered owner (§ 12031, subd. (a)(2)(F)), and felon in possession of a firearm (§ 12021, subd. (a)(1)). In a separate trial, the jury found defendant suffered a prior serious or violent felony conviction under the three strikes law (§§ 667, subds.(b)-(i), 1170.12, subds. (a)-(d)) for federal armed bank robbery (18 U.S.C. §§ 2113(a)-(d)) with the further finding defendant used a firearm in committing the offense (18 U.S.C. § 924(c)). Defendant received the upper term sentence of three years in state prison for the section 12031 offense, which was doubled under the three strikes law. The court stayed imposition of an identical concurrent sentence under section 654.

In his timely appeal, defendant contends the evidence of his federal bank robbery conviction is legally insufficient to support a finding of a serious or violent felony under California law, and the trial court violated his Sixth Amendment jury trial right by imposing the upper term for his convictions without a jury finding on the aggravating factors pursuant to *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856] (*Cunningham*) and *Blakely v. Washington* (2004) 542 U.S. 296, 301 (*Blakely*). We disagree and affirm.

STATEMENT OF FACTS

Because both appellate contentions involve sentencing-related issues, and the sufficiency of the evidence of the charged offenses is not in dispute, we briefly summarize the facts. On the early evening of June 30, 2006, Officers Charles Joh and Darryl Norwood were in their unmarked patrol car. Near the intersection of 56th Street and San Pedro Boulevard in Los Angeles, Officer Joh saw a new Dodge Charger driving

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1 All further statutory references are to the Penal Code, unless indicated otherwise.

on the wrong side of the street. The vehicle was registered to defendant. The officers made a traffic stop of the Charger, which was driven by defendant. Passengers were in the front and back seats. Officer Joh found a fully loaded semiautomatic handgun on the driver side floorboard. The firearm was not registered to defendant. It was stipulated that defendant was a felon.

Ellen Atwater, defendant's boyfriend, testified on his behalf. On the afternoon preceding the underlying incident, Atwater received a firearm from a person who was selling weapons on the street; it looked similar to the one found in defendant's car. She had the keys to defendant's Charger, and placed the firearm under the driver seat and drove home. When she returned from work the following day, the car had been impounded and she discovered defendant had been arrested. Atwater was impeached with prior criminal convictions.

DISCUSSION

Federal Bank Robbery Conviction

Defendant contends the evidence of his federal bank robbery conviction is legally insufficient to support a finding of a serious or violent felony under California law. A recent opinion by our Supreme Court, however, holds that evidence materially indistinguishable from that presented below was sufficient to support a "strike" finding. (*People v. Miles* (2008) 43 Cal.4th 1074, 1088-1093 (*Miles*).) Under *Miles*, defendant's argument must be rejected.

Defendant seeks to exploit an ambiguity in subparagraph (a) of the federal bank robbery statute 18 United States Code section 2113. The first paragraph of that provision sets forth an offense that is a strike under California law, but the offense described in the second paragraph is not. (*Miles, supra,* 43 Cal.4th at pp. 1081-1082.) "Though there is no California convictable offense of bank robbery, Penal Code section 1192.7,

subdivision (c) lists a crime of this name as a serious felony, a prior conviction for which may enhance the sentence for a subsequent offense. ([§ 1192.7], subd. (c)(19).) For this purpose, Penal Code section 1192.7 defines ' "bank robbery" ' as 'to take or attempt to take, *by force or violence, or by intimidation* from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association.' (*Id.*, subd. (d).)" (*Miles, supra*, 43 Cal.4th at p. 1081, emphasis added.) In comparison, 18 United States Code section 2113(a)'s first paragraph provides that a person can commit bank robbery by taking or attempting to take property "by force or violence, or intimidation," while the second paragraph requires only the entry into a bank or other such institution with the intent to commit any felony affecting that institution. (*Miles, supra*, 43 Cal.4th at pp. 1080-1081.) In short, "evidence that the defendant suffered a previous conviction under 18 United States Code section 2113(a), standing alone, cannot establish that the conviction was for a serious felony under California law." (*Miles, supra*, at p. 1082.)

In *Miles*, our Supreme Court held that where there is substantial evidence the defendant's federal bank robbery conviction was not merely under 18 United States Code section 2113(a), but also included another subdivision such as subparagraph (d)[2] (armed bank robbery) or subparagraph (e) (kidnapping), there is a very strong inference that the underlying offense involved the force, violence, or intimidation required under the first paragraph of 18 United States Code section 2113(a)—thereby qualifying it as a strike under California law. (*Miles, supra*, 43 Cal.4th at pp. 1088-1093.) As we explain, at defendant's trial, the prosecution presented more than a bare conviction under 18 United States Code section 2113(a). Rather, as in *Miles*, there was solid, reliable evidence that

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2 "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than twenty-five years, or both." (18 U.S.C. § 2113(d).)

defendant committed an armed bank robbery under 18 United States Code sections 2113(a) and 2113(d).

Here, the information alleged a single serious or violent prior conviction or "strike"—a federal armed bank robbery on June 1, 1998, in violation of 18 United States Code section 2113(a) and 2113(d). At the time of the bifurcated trial on the prior conviction, the prosecution informed the trial court and defense that it also intended to prove a special finding of firearm use under 18 United States Code section 924(c), based on that same conviction. The defense argued pursuant to *People v. Jones* (1999) 75 Cal.App.4th 616 (*Jones*), that the record was insufficient to establish the prior was a "serious or violent" felony for three strikes law purposes because a federal bank robbery conviction under 18 United States Code 2113(a) could be committed without the force or violence element necessary to qualify as a "strike." The trial court rejected that argument because the prosecution's certified documentary evidence showed that, contrary to *Jones*, defendant committed the federal offense by either assaulting a person or putting a person's life in jeopardy by using a dangerous weapon (18 U.S.C. § 2113(d)), or by using a firearm in the commission of the crime (18 U.S.C. § 924(c)).

Before the taking of evidence, the trial court made a preliminary assessment that the alleged strike, a federal armed bank robbery conviction, was a serious or violent felony under the three strikes law. For the prosecution, a paralegal from the District Attorney's office testified as to the authenticity of a certified document from the United States Department of Justice, which showed that defendant suffered a conviction for armed robbery in violation of 18 United States Code sections 2113(a) and 2113(d), and that he was found to have used a firearm during a "crime of violence" in violation of 18 United States Code section 924(c). The trial court admitted a portion of the packet obtained by the paralegal, which contained the federal certification of authenticity and the

"Judgment and Probation/Commitment Order" by United States District Court Judge George H. King, dated June 4, 1998. Defendant presented no affirmative case.[3]

"The People must prove all elements of an alleged sentence enhancement beyond a reasonable doubt. [Citation.] Where, as here, the mere fact of conviction under a particular statute does not prove the offense was a serious felony, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue." (*Miles, supra*, 43 Cal.4th at p. 1082.) "Such evidence may, and often does, include certified documents from the record of the prior proceeding and commitment to prison." (*Ibid.*) "On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*Id.* at p. 1083.)

"[I]f the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense." (*Miles, supra*, 43 Cal.4th at p. 1083.) However, "the trier of fact may draw *reasonable inferences* from the record presented. Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record, and describing the prior conviction, is truthful and accurate. Unless

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3 After the jury was instructed, the defense objected to the jury's consideration of 18 United States Code section 924(c) finding on the ground that the information did not allege it. The court overruled the objection, finding the weapon enhancement was part of the same judgment supporting the strike allegation and, accordingly, the defense had ample notice and opportunity to prepare a defense. As 18 United States Code section 924(c) aspect of defendant's federal conviction is not necessary to support defendant's three strikes law sentence, we do not consider it or reach the issue of the trial court's ruling on this point.

rebutted, such a document, standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction." (*Ibid.*)

As in *Miles*, the primary piece of prosecution evidence was the federal district court judge's certified "Judgment and Probation/Commitment Order," which recited that defendant had entered a guilty plea to "Armed Bank Robbery" with reference to 18 United States Code sections 2113(a) and 2113(d). (*Miles, supra*, 43 Cal.4th at p. 1077.) Unlike the situation in *Miles*, defendant's federal judgment form, signed by Judge King, not only recited a conviction under 18 United States Code section 924(c) for use of a firearm during a crime of violence, but ordered restitution to the victim bank in the amount of $1,704.

The *Miles* court found sufficient evidence that the prior federal conviction was for a California serious felony based on the federal judgment form's reference to "bank robbery" and its indication that the defendant had "further violated the 'armed' and 'kidnapping' provisions of the statute." (*Miles, supra*, 43 Cal.4th at p. 1089.) In the absence of any notation to the contrary, "the most reasonable inference is that [the federal judge] intended to describe the 'force and violence, or . . . intimidation' form of offense set forth in [18 United States Code] section 2113(a)." (*Miles, supra*, at pp. 1089-1090.) As the Supreme Court explained: "It is highly unlikely that one charged and convicted under [18 United States Code] section 2113(a) only for entering a bank with felonious or larcenous intent, without an attempted or actual taking of property by force and violence or intimidation, would also be found, in the course of the offense, to have placed a victim's life in jeopardy by use of a dangerous weapon, and to have taken a hostage. In the absence of any rebuttal evidence as to the nature of the prior conviction, the trial court was entitled, prima facie, to draw the more reasonable inference that it was for committing the California serious felony of bank robbery." (*Id.* at p. 1088, fns. omitted.)

The *Miles* court further noted that the mere theoretical possibility that a defendant might have committed the armed bank robbery under 18 United States Code section 2113(d) while merely entering the bank with felonious or larcenous intent would

not be sufficient to require the California court to disregard the more reasonable, contrary inference—at least where there was no rebuttal evidence. (*Id.* at p. 1088, fn. 10.) As is in *Miles*, defendant merely asserts the abstract possibility that defendant committed the robbery while armed but without using force, violence, or intimidation—and without taking any property. We reject that assertion as pure speculation in the face of defendant's 18 United States Code section 2113(d) conviction for assault or jeopardizing the life of any person by the use of a dangerous weapon, along with Judge King's implicit finding that money was taken during the bank robbery. In addition, Judge King's finding that defendant plead guilty to "Armed Bank Robbery" strongly supports the inference that defendant committed the robbery form of violation of 18 United States Code section 2113(a), as opposed to the burglary form of the offense.

We are aware that the defendant in *Miles* had been convicted under 18 United States Code section 2113(e) for kidnapping, in addition to 18 United States Code sections 2113(a) and 2113(d). (*Miles, supra*, 43 Cal.4th at pp. 1077, 1089.) However, nothing in the *Miles* opinion indicates that the kidnapping aspect of the federal conviction was necessary for the underlying conviction to qualify as a serious felony under California law. Similarly unavailing is defendant's reliance on *Jones, supra,* 75 Cal.App.4th 616. In *Jones,* there was no reliable evidence that the defendant had been convicted of an armed bank robbery under 18 United States Code section 2113(d). Rather, the judgment documentation showed the defendant had been charged under 18 United States Code sections 2113(a) and 2113(d), but apparently only entered a guilty plea only under the former subparagraph. (See *Miles, supra,* 43 Cal.4th at pp. 1092-1093.)

In sum, as the prosecution's unrebutted evidence showed a bank robbery with the aggravated conduct of arming under 18 United States Code section 2113(d), along with evidence that money was actually taken during the underlying federal offense, there was sufficient evidence his conviction under 18 United States Code section 2113(a) was for the California serious felony of bank robbery and thus qualified to enhance his sentences

for the current offenses pursuant to the three strikes law. (See *Miles, supra,* 43 Cal.4th at pp. 1093-1094.)

Sentencing

Defendant also contends the imposition of the upper term sentences on his California convictions violated his Sixth Amendment jury trial right to have a jury finding on the aggravating factors pursuant to *Cunningham, supra,* 549 U.S. at page ___ [127 S.Ct. at p. 871] and *Blakely, supra,* 542 U.S. at page 301. We disagree.

In *People v. Black* (2007) 41 Cal.4th 799, 805 (*Black II*) and *People v. Sandoval* (2007) 41 Cal.4th 825, 831 (*Sandoval*), the California Supreme Court examined the imposition of an upper term under the state determinate sentencing law in light of *Cunningham, supra,* 549 U.S. at page ___ [127 S.Ct. at pp. 863-864]. Our Supreme Court held: "[A]s long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*)] and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Black II, supra,* 41 Cal.4th at p. 812.) Our Supreme Court further held: "It follows that imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Id.* at p. 816.)

In addition, *Black II* made it clear that, consistent with *Apprendi,* aggravating circumstances justifying the upper term may be established "based upon the defendant's record of prior convictions." (*Black II, supra,* 41 Cal.4th at p. 816.) Further, "'[r]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence.' [Citation.]" (*Id.* at p. 818.) *Black II* held the prior

conviction exception includes "not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions." (*Id.* at p. 819.) "The determinations whether a defendant has suffered prior convictions, and whether those convictions are 'numerous or of increasing seriousness' (Cal. Rules of Court, rule 4.421(b)(2)), require consideration of only the number, dates, and offenses of the prior convictions alleged. The relative seriousness of these alleged convictions may be determined simply by reference to the range of punishment provided by statute for each offense. This type of determination is 'quite different from the resolution of issues submitted to a jury, and is one more typically and appropriately undertaken by a court.' [Citation.]" (*Id.* at pp. 819-820, fn. omitted.)

Here, in finding aggravating circumstances outweighed those in mitigation, the trial court found no mitigating factors, but referred to various factors in aggravation—the "planning, sophistication, and professionalism" exhibited in the commission of the underlying offenses, defendant's prior adult criminal convictions and his sustained juvenile petitions, and the fact that defendant was on federal probation at the time of the underlying offenses, all of which tended to show defendant was a serious danger to society and that his prior performance of parole was unsatisfactory. (Cal. Rules of Court, rules 4.421(b)(1), 4.421(b)(4).) Because defendant's "criminal history" established aggravating circumstances which "independently satisf[ied] Sixth Amendment requirements and render[ed] him eligible for the upper term[,] . . . he was not legally entitled to the middle term, and his Sixth Amendment right to a jury trial was not violated by imposition of the upper term sentence . . . ." (*Black II, supra,* 41 Cal.4th at p. 820; *People v. Burch* (2007) 148 Cal.App.4th 862, 873 ["The use of prior convictions as factors for a sentencing departure from the statutory maximum (middle term) is constitutionally permissible because it falls within the Supreme Court's bright-line exception"]; see also *People v. Yim* (2007) 152 Cal.App.4th 366, 371.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.